Supreme Court, U.S.
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No. 06-35

IN THE

Supreme Court of the United States

BEVERLY S. MALONE,

Petitioner,

v.

AMERICAN EQUITY INVESTMENT LIFE INSURANCE CO. and CHARLES W. STRUBE, individually and as Trustee of the Charles W. Strube Revocable Trust, on behalf of himself and all others similar situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CHARLES W. STRUBE

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QUESTION PRESENTED FOR REVIEW

The question presented is whether petitioner is entitled to have this Court review *de novo* the Eleventh Circuit's interpretation of a release.

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STATEMENT OF THE CASE

Petitioner Beverly Malone is a member of a nationwide settlement class benefiting 23,000 elderly victims who purchased deferred annuities — called "equity indexed annuities." Respondent Charles Strube brought the class action against respondent American Equity alleging wrongful conduct in connection with the sale of the annuities. (A 2a)* While this case was pending in the district court, petitioner was pursuing virtually the same issues in her own class action in Kentucky state court against a number of defendants, including American Equity and many of its agents.

The focus of the Strube litigation was the inability of the elderly purchasers to receive a stream of needed income which they anticipated receiving from their equity indexed annuities without incurring penalties and forfeitures. Under the terms of the Strube settlement approved by the district court, the parties agreed that all class members would be entitled to receive that income without any penalties or forfeitures. Additionally, all class members would be eligible to receive a 2% enhancement on the value of their annuities. (A 15a-16a) The settlement also provided for non-economic benefits aimed at preventing similar practices in the future. (A 16a-17a) In exchange for the right to receive the benefits of the settlement, the class was required to release American Equity and its agents. (A 19a)

Petitioner elected not to opt-out of the Strube settlement. Instead, she filed an objection primarily taking issue with the scope of the release in order to continue her own class litigation in Kentucky against American Equity and its agents. She claimed that the method used to sell equity indexed annuities to her putative class members was sufficiently different because it involved the sale of a so-called "living

* Citations to (A) refer to petitioner's appendix.

trust" which was funded by the annuity. (A 30a-31a) As reflected in the record, petitioner was the *only* member of her putative Kentucky class who objected.

In a post-settlement proceeding in the district court, American Equity sought to enforce the release by enjoining petitioner from proceeding against it and its agents in Kentucky. The district court denied American Equity's motion interpreting the release language to exclude petitioner's Kentucky claims. On appeal, the Eleventh Circuit affirmed the district court's approval of the settlement, but determined that by the clear wording of the settlement release, petitioner was barred from further pursuing American Equity and its agents. (A 5a-6a) Petitioner sought en banc review which was denied. She now improperly seeks a second plenary appeal in this Court.

REASONS FOR DENYING THE PETITION

I. Petitioner improperly seeks a second level appellate review of a determination by the Eleventh Circuit regarding the scope of the release contained in the approved class action settlement agreement solely on the grounds that the Eleventh Circuit's determination differs from that of the district court.

Petitioner's claim in this Court is spurious. She was afforded full opportunity to present her case both in the district court and in the Eleventh Circuit. This Court should not countenance further appellate review of the individual injustice which petitioner claims to have suffered. The district court approved the settlement and the approval was affirmed on appeal. As a result of the settlement, substantial benefits are now available to all class members, including petitioner, and American Equity has changed the way it does business. The reality is that petitioner is disappointed that she cannot lead her own class action, and has held up implementation of the settlement hoping to get her way.

The issue of the release arose in the post-settlement request by American Equity to enjoin petitioner from seeking relief in Kentucky. Petitioner claimed that the "living trust" pitch for selling equity indexed annuities was distinguishable from the "free lunch" financial seminar commonly used by American Equity's agents. As such, she should be able to assemble her own class of "living trust" victims and represent them in a completely separate action. The Eleventh Circuit affirmed the settlement approval, but disagreed with the district court's interpretation of the release and enjoined petitioner from pursuing American Equity and its agents in Kentucky. (A 5a-6a) In so ruling, the appellate court noted that petitioner had taken inconsistent positions regarding the effect of the release first by acknowledging that the plain language of the release precluded her from pursuing her Kentucky action, and then in the next breath claiming that she could proceed with her state court action:

> Both petitioner and American Equity recognize that the plain language of the settlement forbids petitioner from maintaining her action against American Equity in Kentucky for claims arising out of their creation of a living trust for her. Petitioner's trust was funded by her purchase of an equity-indexed annuity from American Equity. In her pleadings and statements before the district court, petitioner described the living trust as a "Trojan horse" for the sale of equity-indexed annuities. Because the living trust is, "in whole or in part," "connected with" and "related to" the sale of equity-indexed annuities, the terms of the settlement agreement release American Equity from any potential liability concerning petitioner's living trust.
>
> Nonetheless, petitioner contends that the Kentucky suit remains viable. She claims that the

> plain language reading of the settlement is trumped by the district court's interpretation of the settlement as not releasing claims connected to living trusts. However, our interpretation of the settlement is determined by its plain language, and not by any interpretive glosses provided by the district court. (A 4a)

The plain language of the settlement agreement supports the Eleventh Circuit's ruling. American Equity and all of its agents involved in the marketing and sale of deferred annuities were released. (A 19a, 30a-31a)

To bring this issue before the Court, petitioner couches her argument in an unsupported "due process" veneer. Simply stated, there has been no violation of petitioner's right of due process. She was given proper notice of the terms of the settlement. She was given the option of participating, opting-out or objecting. She elected not to opt-out and instead filed objections. Hearings were held and she appeared at every one of them through counsel who presented argument. If the district court were to have granted the injunctive relief, rather than the Eleventh Circuit, certainly no claim of a due process violation could be made. The fact that the *appellate* court, rather than the *district* court, granted the injunction does not transform the matter into a due process violation.

As a practical matter, petitioner could have avoided her current situation and could have preserved her own right to sue American Equity and its agents in Kentucky state court simply by opting out of the Strube settlement class in the first place. By staying in the Strube class, petitioner took the risk that the court would reject her objections and that consequently all of her extracurricular claims against American Equity and its agents would be forever barred. In an effort to save her own class action, however, petitioner has continuously ignored the fact that those seniors in the

putative Kentucky class who she professes to represent are likewise in need of — and are now entitled to receive — immediate benefits afforded by the settlement in this case. It makes no difference whether an equity indexed annuity was purchased as a result of a "free meal" seminar or a sales pitch which included a living trust. Petitioner's class members have now spoken by not opting out of the Strube settlement. They too want this matter concluded, consistent with approval of the settlement at two judicial levels.

> As petitioner concedes, her objections to the settlement are not shared by any other of her fellow class members. Her criticisms of the agreement are peripheral to the chief bargains struck between the plaintiff class and American Equity. (A 5a)

Petitioner therefore has no one to lead as a class representative, and the Eleventh Circuit recognized this. The Eleventh Circuit simply interpreted a written document on its face differently from the district court. Such a ruling does not warrant invoking the jurisdiction of this Court and under no circumstances does the reversal on the injunction issue give rise to a due process violation.

II. Petitioner has made misstatements in her petition regarding the state of the record, and in particular regarding alleged collusion on the part of respondents' counsel.

Petitioner seeks to raise a policy argument for the very first time in this Court ostensibly based upon the new Class Action Fairness Act. In an attempt to make her point, petitioner has made completely unfounded and scurrilous accusations regarding the actions of respondents' counsel and the economic nature of the settlement. Without any good faith foundation, petitioner asserts that respondents' counsel

colluded with each other in negotiating a resolution of the case which she characterizes as a "coupon settlement" for class members and "extravagant" fees for respondents' counsel. (Petit. at 7, 8, 22, 25) There is no record support for either of these contentions. The district court expressly found that "there is no evidence of any kind that the parties or their counsel have colluded or otherwise acted in bad faith in arriving at the terms of the proposed settlement." (A 40a) Additionally, the district court's opinion refutes any notion that this was a "coupon settlement" in that there were substantial economic and non-economic benefits to the settlement.

The absolute absence of merit as to any of petitioner's contentions is underscored by the fact that petitioner is raising them for the first time in this Court. Had there been the slightest record support, it is fair to assume that petitioner would not have focused her entire appeal in the Eleventh Circuit solely on the scope of the release. Nor did petitioner ever object to Strube being an appropriate class representative until her appeal, at which point the Eleventh Circuit recognized that she had failed to preserve the issue below. (A 5a) Likewise as to attorney's fees, petitioner never objected in the district court and never raised the issue in the Eleventh Circuit.

CONCLUSION

Without record support or preserved error, petitioner cannot expect this Court to sympathize with her case under the broad heading of "due process" or the equally unpersuasive "policy" underpinnings of the Class Action Fairness Act. The focus of this litigation must continue to be on the needs of the elderly victims who purchased equity-indexed annuities with no ability to tap into their investments without incurring substantial penalties and forfeitures. Despite petitioner's protestations that she is interested in protecting the rights of the elderly persons who have been victimized, it is solely her actions which have served to delay and deprive them of the Strube settlement benefits. The petition for certiorari should therefore be denied.

Respectfully submitted,

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